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Supreme Court, U.S.
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No. (1)

IN THE

# Supreme Court of the United States

ROSALIND HERMAN, TRUSTEE, FINANCIAL RESOURCES NETWORK, INC. PROFIT SHARING PLAN AND TRUST,
PETITIONER

*v.*

RUDY K. MEISELMAN, M.D.

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Can a person sued as a ERISA trustee and named as such in the judgment nonetheless be held liable *individually* after the execution erroneously named her personally and the court of appeals retroactively read some of the common law claims in the complaint against her individually?

2. Where the common law claims for fraud and conversion against the petitioner as an ERISA trustee are preempted by ERISA, should the petitioner have reasonably apprehended that these claims exposed her to personal liability upon default?

## RULE 29.6

The petitioner Rosalind Herman, Trustee, Financial Resources Network, Inc., a Profit Sharing Plan and Trust, hereby states that Financial Resources Network, Inc. has no parent company and that no public company or entity owns 10% or more of its stock.

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## OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the First Circuit in *Indianapolis Life Insurance Company v. Rosalind Herman, Trustee, Financial Resources Network, Inc. Profit Sharing Plan and Trust et al.*, C.A. No. 07-1797, decided February 13, 2008, as amended March 4, 2008, affirming the order of the District Court denying the petitioner's emergency motion to stay enforcement of the judgment, is set forth in the Appendix hereto(App. 1-14).

The unpublished order of the District Court for the District of Massachusetts in *Indianapolis Life Insurance Company v. Rosalind Herman, Trustee, Financial Resources Network, Inc. Profit Sharing Plan and Trust et al.*, Docket No. 04-12481 WGY, filed on May 4, 2007, denying the petitioner's emergency motion to stay enforcement of the judgment, is set forth in the Appendix hereto(App. 15).

The unpublished decision in *Indianapolis Life Insurance Company v. Rosalind Herman, Trustee, Financial Resources Network, Inc. Profit Sharing Plan and Trust et al.*, C.A. No. 06-1722, reported at 204 Fed. Appx. 908(1st Cir. 2006), dated November 9, 2006, affirming summary judgment in favor of the respondent Indianapolis Life Insurance Company, is set forth in the Appendix hereto(App. 16-21).

The unpublished judgment of the District Court for the District of Massachusetts in *Indianapolis Life Insurance Company v. Rosalind Herman, Trustee, Financial Resources Network, Inc. Profit Sharing Plan and Trust et al.*, Docket No. 04-12481 WGY, filed

on January 27, 2006, against the cross-claim defendant and petitioner "Rosalind Herman, Trustee, Financial Resources Network, Inc., Profit Sharing Plan and Trust," is set forth in the Appendix hereto(App. 22-23).

The unpublished Order of the United States Court of Appeals for the First Circuit in *Indianapolis Life Insurance Company v. Rosalind Herman, Trustee, Financial Resources Network, Inc. Profit Sharing Plan and Trust et al.*, C.A. No. 07-1797, dated March 7, 2008, denying the petitioner's petition for rehearing or for rehearing *en banc*, is set forth in the Appendix hereto(App. 24-25).

## JURISDICTION

The decision of the United States Court of Appeals for the First Circuit affirming the order of the District Court denying the petitioner's emergency motion to stay enforcement of the judgment was filed on February 13, 2008; and its further order denying the petitioners' timely filed petition for rehearing or for rehearing *en banc* was filed and decided on March 7, 2008(App. 1-14;24-25).

This petition for writ of certiorari is filed within ninety (90) days of March 7, 2008. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

## RELEVANT PROVISIONS INVOLVED

*United States Constitution, Article VI, Par. 2:*

> This Constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in he Constitution or Laws of any State to the Contrary notwithstanding.

*United States Constitution, Amendment V:*

> No person shall...be deprived of life, liberty, or property, without due process of law....

*United States Constitution, Amendment X:*

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

*28 U.S.C. Section 1331:*

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

*28 U.S.C. § 1332(a)(1):*

> **(a)** The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> **(1)** citizens of different States;...

*29 U.S.C. § 1109(a):*

**Liability for breach of fiduciary duty**

**(a)** Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary....

*29 U.S.C. § 1132(d):*

**Civil Enforcement**

**(d) Status of employee benefit plan as entity**

**(1)** An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan....

**(2)** Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person

is established in his individual capacity under this subchapter.

*Fed. R. Civ. P. 4(e)(1):*

> **(e) Serving an Individual Within a Judicial District of the United States.**
>
> Unless federal law provides otherwise, an individual----other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:
>
> **(1)** following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made....

*Fed. R. Civ. P. 69(a):*

> **(a) In General.** Process to enforce a judgment for the payment of money shall be by writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable....

*Mass. R. Civ. P. 69:*

**Execution**

Process to enforce a judgment for the payment of money shall be by writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings on and in aid of execution shall be in accordance with applicable statutes....

## STATEMENT

At all relevant times, the respondent Financial Resources Network, Inc. ("FRNI") was a Massachusetts corporation engaged in business as a registered investment advisor(App. 2). The petitioner Rosalind Herman ("the petitioner" or "Herman") served as its president, treasurer and secretary; she was also a director and shareholder of the company(*Id.*). FRNI administered a profit sharing plan for its employees governed by ERISA, 26 U.S.C. §§ 401(k); 1001 *et seq.*(2000)("the FRN Plan"), with the petitioner Herman acting as the plan administrator and its sole trustee(*Id.*).

In 2002, the respondent Rudy K. Meiselman, M.D. ("Meiselman"), a retired doctor, became a technical analyst for FRNI(*Id.*). Electing to participate in the company's pension plan, Meiselman directed FRNI to make contributions of much of his salary to the plan and he executed a tax-free rollover of his pre-existing retirement funds (over $11 million) into the plan(*Id.*).

During 2003, the petitioner as trustee of the FRN Plan and one Gregg Caplitz, an undisclosed principal of FRNI as well as an insurance agent, submitted to the respondent Indianapolis Life Insurance Company, an Indiana entity, two life insurance applications seeking insurance on the lives of both Meiselman and his wife; the FRN Plan was listed on both applications as the owner and the beneficiary of both policies(App. 2-3). The Meiselmans underwent physical examinations and on November 18, 2003, the FRN Plan paid Indianapolis Life a premium of $1,025,000(App. 3). Caplitz as the agent on these policies received $650,297.01 in commission under the agency contract with Indianapolis Life.

Claiming that these life insurance policies should be rescinded because of the undisclosed health problems of Dr. Meiselman, Indianapolis Life brought suit in the district court for the District of Massachusetts on November 23, 2004, against the petitioner as trustee of the FRN Plan, Caplitz and the Meiselmans(App. 3). Positing jurisdiction on diversity of citizenship, seeking a return of the commission it paid Caplitz and a rescission of both life insurance policies (it had refunded the premium), Indianapolis Life alleged that the petitioner *as trustee of the FRN Plan* had processed the Meiselmans' life insurance applications despite objections by the Meiselmans and without disclosing his failing health(App. 3)(emphasis supplied). Other counts alleged that Caplitz had converted the commission, had breached his agency contract and was unjustly enriched(App. 3). The complaint makes *no* claims against the petitioner in her individual capacity; she is identified in the caption only as trustee of the FRN Plan and the claims raised

against her identify her only in her capacity as the trustee of the FRN Plan.

Besides answering the complaint and agreeing that rescission was warranted, Meiselman invoked federal jurisdiction under 29 U.S.C. §§ 1132(a) and (e), and cross claimed against Herman *as FRN Plan Trustee* and Caplitz seeking damages for allegedly misappropriating his funds, countermanding his directions to transfer his plan assets, wrongfully converting his rollover funds and failing to act as a plan administrator or trustee should act under the law, i.e., ERISA(App. 3). Like Indianapolis Life's complaint, Meiselman's cross claim makes *no* allegations against the petitioner in her individual capacity; she is identified in the relevant captions only as trustee of the FRN Plan and the claims raised against her identify the petitioner only in her capacity as the trustee of the FRN Plan.

For example, Count II's claim for breach of contract allege the breach of employment contract which Herman executed as trustee and not individually. Count III's claim for breach of fiduciary duty is bottomed upon those fiduciary duties which the petitioner owed Meiselman as a trustee, not individually. Count IV's allegations of Herman's breach of contract implicates a contract which the petitioner executed as trustee of the FRN Plan, not individually. Finally, Count V's claim that the petitioner converted funds when she rolled them over for her (and Caplitz's) use describe conduct which Herman carried out as the trustee of the FRN Plan, not individually.

The cross claim defendants, the petitioner among them, failed to answer Meiselman's cross complaint; a

default and then a default judgment eventually entered against the petitioner as trustee of the FRN Plan(App. 3-4). She sought relief from this default judgment while Indianapolis Life moved for summary judgment on its main complaint(*Id.*). The district court, Young, J., refused the petitioner's motion for relief from judgment and granted summary judgment to Indianapolis Life(App. 4). On Meiselman's cross claim, a judgment entered on January 27, 2006, for $938,640.14 plus costs and interest "for Crossclaim Plaintiff Rudy Meiselman against Crossclaim defendant Rosalind Herman, Trustee, Financial Resources Network, Inc., Profit Sharing Plan and Trust"(App. 4;22-23).

The petitioner, FRNI, the FRN Plan and Caplitz all appealed from the these rulings and the ensuing judgment(App. 4;16-21). On November 9, 2006, the court of appeals for the First Circuit affirmed the judgment in favor of Indianapolis Life and the lower court's denial of relief from the judgment. *Indianapolis Life Insurance Company v. Rosalind Herman, Trustee, Financial Resources Network, Inc. Profit Sharing Plan and Trust et al.*, 204 Fed. Appx. 908(1st Cir. 2006)(App. 4;20-21).

In the meantime, in the wake of the judgment, Meiselman on March 6, 2006, obtained from the clerk of the district court an execution for $1,046,955.23 against "Gregg D. Caplitz, Rosalind Herman, and Financial Resources Network, Inc." jointly and severally(App. 4). After some discovery had taken place concerning Herman's financial matters and in the aftermath of the court of appeals' affirmance of the underlying judgment, the petitioner moved to stay enforcement of the execution arguing that the execution made her

personally liable whereas she was actually liable under the default judgment and the underlying claims only in her capacity as trustee of the FRN Plan(App. 5).

The district court, Young, J., denied the petitioner's motion to stay enforcement of the execution without prejudice(App. 5). After more discovery, the petitioner renewed the motion on an emergency basis and on May 4, 2007, the district judge denied the motion without opinion "clearing the way...for Meiselman to proceed against Herman's personal assets in satisfaction of the judgment"(App. 5;15).

The petitioner appealed and in a decision on February 13, 2008, as amended on March 4, 2008, the Court of Appeals for the First Circuit unanimously affirmed the refusal by the district court to stay enforcement of the execution(App. 1-14). Addressing the petitioner's main claim that she was always identified in this suit only in her representative capacity as the trustee of the FRN Plan, that she was never a party to this suit in her individual capacity, that the judgment rightly reflected her status as trustee of the FRN Plan and that the clerk's execution wrongly made her a party individually, the court of appeals first reasoned that this discrepancy between the judgment and the execution was not a matter to be decided by reference to State law under Fed. R. Civ. P. 69(a) but rather was subject to the lower court's inherent powers(App. 6-7).

It surmised that the only way the district court could have concluded that this discrepancy between the judgment and the execution did not warrant correction(the district judge gave no reasons for his ruling) was because Meiselman's cross complaint

sought to impose liability on the petitioner in her personal capacity "and that the judgment should be read conformably"(App. 7). The court of appeals then read Meiselman's cross complaint to allege personal liability on the part of the petitioner. It concluded:

> [a] reasonable litigant, advised by competent counsel, would have had good reason to fear that personal liability might be imposed under some of the theories in the complaint. Further, the complaint made clear that Herman was being charged in some measure with personal dishonesty (for example, that Herman had charged the account for non-existent services...and that she and Caplitz were "helping themselves to Meiselman's money to defend a legal action they instigated by their refusal to carry out their fiduciary obligations").

(App. 9-10).

Moreover, it thought the petitioner, having failed to answer the cross complaint and having been defaulted because of it, waived not only her claim that the common law allegations against her were preempted by ERISA and but also her right to apportion her personal liability with her liability as trustee under the judgment(App. 10-11). It therefore blamed the petitioner's plight in the aftermath of its decision on her own failure to answer complaints, read documents served on her, obey court orders and seek corrections in a timely manner(App. 11). Moreover, "[i]f what happened here is due not to Herman but her former counsel, that is a matter to be settled between them"(App. 11).

On March 7, 2008, the court of appeals denied the petitioner's timely filed petition for rehearing or for rehearing *en banc*(App. 24-25). The petitioner now respectfully brings this petition to the Court seeking a writ of certiorari to the Court of Appeals for the First Circuit.

## REASONS FOR GRANTING THE PETITION

### 1. The Decision Below Conflicts With Decisions of This Court, The Law of Massachusetts And Fundamental Notions of Due Process Which All Hold That A Court Lacks the Power To Adjudicate The Rights Of A Party Who Has Not Been Made A Party To The Action.

The petitioner is not and never has been a party to this action in her individual or personal capacity. She was never served by Indianapolis Life with its complaint or named in its complaint in her individual capacity, only in her capacity as the trustee of the FRN Plan. Meiselman never named her in her individual capacity in his cross complaint, only as the trustee of the FRN Plan. Neither Meiselman nor Indianapolis Life sought a judgment against Herman individually. Yet when the clerk adopted Meiselman's erroneous draft of the execution form which by scrivener's error omitted the designation "trustee" after the petitioner name, Herman mistakenly became *personally* liable on the face of the execution for the indebtedness jointly and severally with the other cross claim defendants.

Rather than correct this patently wrong designation of a party in the execution at odds with both the pleadings and the judgment, one which comes

within Fed. R. Civ. P. 69(a) and the law of Massachusetts on collections and executions which it invokes, the court of appeals characterized this discrepancy as one calling for the exercise of the inherent power of the district court. It then read the cross complaint *in a way in which it never has been read before* to impose retroactively personal liability on the petitioner for her actions as trustee of the FRN Plan, to blame the petitioner and her counsel retroactively for not apprehending this fact and for the default judgment which was entered, and to relegate the petitioner to a malpractice claim against her former lawyer for not adopting the reading it had formulated in its decision.

This result nullifies decisions of this Court holding that a court cannot adjudicate retroactively the rights of persons who were not made party to the action before it without running counter to fundamental notions of due process; and it ignores the applicability of Rule 69(a) in these proceedings and the State law which it invokes, decisional law which clearly holds that the party actually sued as trustee is the *only* party properly before the court for purposes of an execution---*not* a different party who is erroneously named in her individual capacity in the execution.

In the first place, this Court has made clear that "[i]t is an elementary principle that a court cannot adjudicate directly upon a person's right without having him either actually or constructively before it. This principle is fundamental." *Gregory v. Stetson*, 133 U.S. 579, 586(1890). *Accord*, *Commonwealth Trust Co. v. Smith*, 266 U.S. 152, 159(1924). Thus where a person named in an execution has never been served with the

complaint, has never been identified in the complaint or in the cross complaint and where she has not been named in the judgment itself, she has not been brought before the court in any legal fashion and it accordingly has no basis in law or in equity for imposing upon that person the status of a party for the purpose of collecting a money judgment upon an execution.

This principle flows from the fact that one whose property or liberty interest is placed in jeopardy or is subject to the risk of deprivation deserves all the rudiments of due process before such an event takes place. Specifically, the petitioner was entitled to a hearing on the issue of whether she could be held personally liable upon a complaint and judgment imposing upon her only liability in her capacity as trustee of the FRN Plan; and the notice of such hearing in district court should have been reasonably calculated, under all the circumstances, to apprise her of the precise nature of this proceeding, i.e., notice which would reasonably and fairly convey to her the required information so that she could appear and respond effectively with their objections in whatever form was allowed. *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314(1950). See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1,13-14(1978).

Moreover, considering the level of financial deprivation which would flow from the district court's decision, see *Morrissey v. Brewer*, 408 U.S. 471,485-489(1972), the petitioner was entitled to a full evidentiary hearing so that the district court would have a fair and complete record upon which to make its findings on each crucial fact issue while at the same time giving the court of appeals a sufficient record upon

which to review the hearing judge's factfinding. See *Goldberg v. Kelly*, 397 U.S. 254, 269-270(1970). In this process, the parties' burdens of proof would be a preponderance of the evidence. *Addington v. Texas*, 441 U.S. 418, 423(1979). See also *Hamdi v. Rumsfeld*, 542 U.S. 507, 534(2004).

Moreover, this procedure in the lower court would have prevented the court of appeals from retroactively reading Meiselman's cross complaint long after it was filed in order to determine what the petitioner and her attorney should have apprehended about the nature of her liability. Because no due process hearing in district court preceded this reading, because there was no opportunity for the petitioner to argue or present evidence against a reading which found personal liability(e.g., that the complaint and cross complaints were misleading) and because it imposed new obligations upon her without fair warning at the appellate level, this retroactive reading by the court of appeals was unfair and a denial of due process. *Goldberg v. Kelly, supra.* See *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 329,331 & n.15(1979). *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313,334(1971).

In the second place, contrary to the court of appeals' conclusion that the district court possessed the inherent power to resolve this discrepancy between the judgment and the execution, this Court has consistently held that in a proceeding to execute on a judgment, the district court is bound pursuant to Fed. R. Civ. P. 69(a) to follow State law in determining whether the person affected has an interest in property which is subject to execution. *United States v. Yazell*, 382 U.S. 341, 354-

356(1966). *Custer v. McCutcheon*, 283 U.S. 514, 518(1931). *Fink v. O'Neil*, 106 U.S. 272, 279-280(1882).

In this regard, Massachusetts law is uniform that a person neither named nor identified in the summons, complaint, cross complaint or judgment as a party in interest cannot be named in the execution as a person whose property is now subject to execution. See, e.g., *New Eng. Oil & Co. v. Canada Mexico Oil Co.*, 274 Mass. 191, 198(1931)("The Trustees in their capacity as trustees alone are parties to this suit. As individuals in their private capacity they can be made parties only by amendment of the bill and service of process or voluntary appearance. *No proper steps have been taken to make them as individuals parties to this suit.*")(emphasis supplied). *Cochrane v. Forbes*, 265 Mass. 249, 255-256(1928)("The trustees in their individual capacity could not be made parties defendant to the bill or to the amended bill without service of process....In the absence of service upon them in their private capacity *the court was without jurisdiction* to determine the issue raised at the hearing which affected the defendants as individuals.")(emphasis supplied). *Eaton v. Walker*, 244 Mass. 23, 29-31(1923).

To treat this question as one invoking the inherent powers of the district court, as the court of appeals has done, instead of invoking this clear law of Massachusetts on the subject consistent with Fed. R. Civ. P. 69(a), not only constricts the reach of Rule 69 but also undercuts the notions of federal-state comity which underlie *Erie R. Co. v. Tompkins*, 304 U.S. 64(1938).

Under *Erie*, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Felder v. Casey*, 487 U.S. 131, 151(1988) quoting *Guaranty Trust Co. York*, 326 U.S. 99, 109(1945). Avoiding judge-made rules in federal court which undercut a litigant's rights which he otherwise would enjoy under state law promotes comity and federalism, discourages forum-shopping and acknowledges that the pronouncements of the State courts on the substantive rights of its citizens are in most cases expressions of their sovereignty. *Bush v. Gore*, 542 U.S. 692, 740-742(2000) (Rehnquist, C.J., concurring)."The nub of the policy that underlies *Erie*...is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *Ferens v. John Deere Co.*, 494 U.S. 516, 524(1990) quoting *Guaranty Trust Co. v. York, supra.*

This Court has made clear in various decisions after *Erie* that federal courts determine State law the same way they determine federal law, i.e., "with the aid of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law." *Salve Regina College v. Russell, supra*, quoting *Meredith v. Winter Haven*, 320 U.S. 228, 238(1943). See *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 208-209(1938). See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730(1979); *West v. A.T. & T. Co.*, 311 U.S. 223, 236-237(1940); *Six Companies v. Highway Dist.*, 311 U.S. 180, 188(1940).

Here Rule 69(a) and the above cited Massachusetts law establish that a person named as a trustee in the summons, complaint, cross complaint and judgment cannot be named individually in the execution as a person whose property is now subject to execution. The court of appeals' decision to the contrary undercuts *Gregory v. Stetson, supra*, the due process requirements laid down by this Court, Rule 69(a), clear State law on the subject and the notions of federalism and comity which prompted *Erie's* principles. This "blatant federal-court nullification of state law," *Michael O. Leavitt v. Jane L.*, 518 U.S. 137, 144-145(1996) invokes this Court's power of superintendency over the federal courts so that the decision below does not ignore clear cut State law or damage federal-state relations.

**2. The Decision Below Allows An Execution To Issue Against The Petitioner Personally For Common Law Claims Which This Court Has Held Are Preempted By ERISA And Ones Which The Petitioner Could Not Have Reasonably Apprehended Were Valid Ones Against Her Personally.**

When Congress enacted ERISA in 1974, it decided to insure uniformity in employee benefit plan regulation and avoid conflicting and overlapping State regulation by providing in 29 U.S.C. § 1144(a), that "the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan...."(emphasis supplied). This language has been broadly interpreted by this Court to displace any State law or State common law causes of

action which "relate[] to" a benefit plan within ERISA's ambit. *FMC Corp. Holliday*, 498 U.S. 52, 58(1990). *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 98(1983). Accord, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209;216(2000). *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-138(1990).

This law favoring broad ERISA preemption bolsters this Court's ruling in *Massachusetts Mut. Life Ins. v. Russell*, 473 U.S. 134, 144(1985) which interpreted 29 U.S.C. § 1109(a), to mean that the trustee is liable to the ERISA plan but *not* to an individual beneficiary and that those state causes of action against a trustee relating to the employee benefit plan are preempted by ERISA even if the elements of the state cause of action asserted do not precisely duplicate the elements of an ERISA claim. *Aetna Health Inc. v. Davila, supra.*

Thus it was error for the court of appeals to suppose that the petitioner or her attorney should have ignored this well-established broad preemption of ERISA and somehow apprehended that Meiselman's cross complaint exposed her to *personal* liability for her conduct relating to the FRN Plan as a trustee. Nor was the court of appeals justified in ruling, contrary to *Russell*, that because the petitioner had defaulted, she could now be held liable as trustee to Meiselman as beneficiary.

Because a default had entered against the petitioner for failure to answer did not give the district court or the court of appeals license to forfeit its obligation to apply the law as set forth by this Court in *Russell* when issuing an execution, violating this decision by imposing personal liability on the petitioner

to Meiselman, the beneficiary of an ERISA plan.

## CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit and, ultimately, to vacate and reverse this judgment and remand the matter to the United States District Court for the District of Massachusetts, with instructions that any new judgment operate against the petitioner *only* in her capacity as trustee of the FRN Plan, and providing the petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 07-1797
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

INDIANAPOLIS LIFE INSURANCE COMPANY,
Plaintiff,

v.

ROSALIND HERMAN, TRUSTEE, FINANCIAL RESOURCES NETWORK, INC. PROFIT SHARING PLAN AND TRUST; FINANCIAL RESOURCES NETWORK, INC. PROFIT SHARING PLAN AND TRUST,
Defendants, Cross-Claim Defendants, Appellants,

RUDY K. MEISELMAN, M.D.,
Defendant, Cross-Claim Plaintiff, Appellee,

GREGG D. CAPLITZ; HOPE E. MEISELMAN,
Defendants.

February 13, 2008, Decided As Amended March 4, 2008.

COUNSEL: Robert D. Cohan with whom Cohan Rasnick Myerson LLP was on brief for appellants.

Charles P. Kazarian, P.C. for appellee.

JUDGES: Before Boudin, Chief Judge, Campbell and Stahl, Senior Circuit Judges.

OPINION BY: BOUDIN

OPINION

BOUDIN, *Chief Judge.* In the district court, the plaintiff (now appellee) Rudy Meiselman obtained a default judgment against defendant (now appellant) Rosalind Herman--trustee of the Financial Resources Network Profit Sharing Plan and Trust ("FRN plan"). The dispute on this appeal is whether Herman, named in some court papers as trustee and in others not, is liable only in her trustee capacity or whether she is personally liable to Meiselman.

Financial Resources Network, Inc. ("FRNI") is apparently a Massachusetts corporation engaged in business as a registered investment advisor. During the pertinent period, Herman served as president, treasurer, secretary and a director of the company; Meiselman has alleged that she is the sole shareholder but that Gregg Caplitz is an undisclosed principal who controls the company. FRNI administers a profit sharing plan for its employees governed by the Employee Retirement Income Security Act (ERISA), 26 U.S.C § 401(k) (2000); 29 U.S.C. § 1001 et seq. (2000), and Herman acted as plan administrator and sole trustee.

Meiselman, now living in Florida, is a retired doctor who in 2002 became a technical analyst for FRNI. In joining the company, he elected to participate in the pension plan, directed that much of his salary be contributed to the plan and executed a tax-free rollover of his pre-existing retirement funds--over $ 11 million--into the plan. At the end of June 2004, Meiselman directed Herman to transfer all the assets in his plan account to a new IRA account that he had established

elsewhere.

In November 2004, Indianapolis Life Insurance Company ("Indianapolis Life") brought a law suit in the Massachusetts federal district court against "Rosalyn Herman, Trustee," FRN Trust (but not FRNI), Caplitz and Meiselman and his wife. The complaint sought to rescind life insurance policies on the lives of Meiselman and his wife (designating the FRN plan as beneficiary) and to recover a large agent's commission paid to Caplitz. The complaint alleged that Herman had proceeded with the applications despite Meiselman's objection and without disclosing his failing health.

Meiselman answered the complaint (endorsing rescission), and "cross-claimed" against FRNI (although it was not a party), Herman and Caplitz. The cross-complaint sought substantial damages growing out of alleged derelictions by the cross-claim defendants in misappropriating Meiselman's funds and failing to execute his earlier directive to transfer his plan assets. The claims were based on various theories including breach of Meiselman's employment contract and pension plan rights, breach of fiduciary duty under ERISA and conversion of property.

The cross-claim defendants never answered Meiselman's complaint, a default was entered on June 28, 2005, and on August 18, the district court granted Meiselman's motion for default judgment. On January 6, 2006, Meiselman sought entry of a separate final judgment in the amount of $ 938,640.14, Fed. R. Civ. P. 54(b), while on January 10, Herman and her co-defendants sought relief from the default judgment, Fed. R. Civ. P. 60(b), on account of their then-counsel's

allegedly excusable neglect in failing to answer. The district court held a hearing on January 25, 2006, refused to undo the default, and the following day granted Indianapolis Life's motion for summary judgment. On January 27, the court entered a final judgment on all the claims in the case, including Meiselman's cross-claim. On the cross-claim, the judgment was for $ 938,640.14 plus costs and interest "[f]or Crossclaim Plaintiff Rudy Meiselman against Crossclaim defendant[] Rosalind Herman, Trustee, Financial Resources Network, Inc., Profit Sharing Plan and Trust."

Herman, the company, the plan and Caplitz sought review of the final judgment in this court, challenging the grant of summary judgment to Indianapolis Life and the denial of their request to undo the default. In a *per curiam* decision, this court upheld both of the district court's actions. *Indianapolis Life Ins. Co. v. Herman*, 204 Fed. Appx. 908, 910 (1st Cir. 2006) ("*Meiselman I*"). That final judgment is controlling in this case; the present appeal concerns its interpretation and Meiselman's efforts to enforce it.

On March 6, 2006, Meiselman obtained an execution from the clerk of the district court for $ 1,046,955.23 (plus costs and post-judgment interest) against "Gregg D. Caplitz, Rosalind Herman, and Financial Resources Network, Inc.," jointly and severally. Meiselman noticed Herman's deposition and sought production of an assortment of her personal financial documents. When Herman failed to appear, a magistrate judge held a hearing on October 18, 2006, and found Herman in contempt. At a subsequent show cause hearing on

November 20, Herman agreed to produce the requested documents and to appear for a deposition.

On December 15, 2006, Herman filed a motion to stay enforcement of and correct the execution, arguing that the execution made her personally liable whereas she was actually liable only in her capacity as trustee. Opposing the motion, Meiselman asked the district court to amend the judgment to remove the trustee designation following Herman's name. At a hearing on December 21, the district court denied Herman's motion without prejudice, instructed her to purge herself of the contempt order before filing further motions, and denied Meiselman's motion as moot.

On March 6, 2007--after Herman had been deposed and had produced certain documents--the contempt order was lifted. Herman then renewed her motion to stay enforcement of and correct the execution, and Meiselman renewed his motion to amend the judgment. On May 4, 2007, the district court issued an order without opinion denying Herman's motion, clearing the way--it appears--for Meiselman to proceed against Herman's personal assets in satisfaction of the judgment.

Herman has now filed a timely appeal with this court arguing that the district court erred in not amending the execution to conform to the judgment; she asserts that the cross-complaint and resulting judgment made her liable only in her capacity as trustee of the FRN plan. Meiselman defends the district court's orders. We are now left to sort out this sorry tangle. The standard of review (Herman says *de novo*; Meiselman, abuse of discretion) depends on the particular issue. *See Roger*

*Edwards, LLC v. Fiddes & Son*, 427 F.3d 129, 132 (1st Cir. 2005).

The sole order under review, evidenced only by a docket entry, was entered on May 4, 2007, denying the "emergency motion" by Herman and the plan to set aside and correct the execution as not conforming to the judgment; the motion also sought to set aside an attachment secured against Herman's residence and an order against Meiselman preventing him from "proceeding against Herman's personal assets to collect the Original Judgment" entered January 27, 2006, and upheld in *Meiselman I*.

Herman's main and best argument is that she was never a party to the case in her personal capacity and that the judgment itself ran against her only in her capacity as trustee. If so, the execution procured by Meiselman, seemingly effective against Herman in her personal capacity, would be inconsistent with the judgment. Ordinarily, a money judgment against an individual in his official capacity runs only against the entity's assets. n1

The district court has inherent power to correct an execution at odds [*8] with the supporting judgment; this does not, as some of the briefing suggests, depend on state law. The judgment is that of the district court and while state procedures can be used for collection, Fed. R. Civ. P. 69(a), a discrepancy between two directives of the district court--judgment and execution--would be a matter subject to the court's inherent powers. *See Patton v. Sec'y of Dep't of Health & Human Servs.*, 25 F.3d 1021, 1027 (Fed. Cir. 1994); Fed. R. Civ. P. 60(a).

Here, the district court gave no reason for its denial of Herman's motion, but, in opposing the motion, Meiselman had argued that the cross-complaint sought to impose liability on Herman in her personal capacity and that the judgment should be read conformably. The district judge, we can assume, accepted this view. No other basis for denying the motion was urged. And such an interpretation explains why the district judge found it unnecessary to rule on Meiselman's back-up motion to amend the judgment itself.

At first blush, such a reading of the cross-complaint and judgment might seem surprising: the case caption in the district court throughout the case described the first defendant as "Rosalind Herman, Trustee," and the pertinent final paragraph of the judgment awarded the money judgment to Meiselman "against . . . Rosalind Herman, Trustee" (along with the other two cross-claim defendants). Nor was she re-served in her individual capacity. n2 But the case caption is not conclusive and the judgment is subject to more than one reading.

The caption started with the original complaint by Indianapolis Life and, so far as Herman was a defendant in that aspect of the case, she was certainly sued by Indianapolis Life in her capacity as trustee. The main relief sought against her was to rescind policies of which the plan was beneficiary; monetary relief was sought only against Caplitz for the large agent's commission he had received. So the principal question is how the *cross-claim* and *the judgment entered upon it* should be read.

Although the cross-claim caption also referred to Herman as "trustee," as does the later judgment, in

federal cases the court examines the substance of the complaint and the parties' litigation conduct to determine the capacity in which a defendant was sued. n3 This approach eschews mechanical reliance on the form of the caption or individual designation and is consistent with the practical approach to construction of pleadings and orders taken by the Federal Rules. *See Duckworth v. Franzen*, 780 F.2d 645, 649-50 (7th Cir. 1985), *cert. denied*, 479 U.S. 816, 107 S. Ct. 71, 93 L. Ed. 2d 28 (1986); Fed. R. Civ. P. 15(b).

Meiselman stresses that in identifying parties to the cross-claim, the cross-complaint at the outset described Herman as "a natural person," adding thereafter her business affiliations; but this also proves little: she would be a natural person even if she were sued solely in her capacity as trustee. What matters most, in our view, is the substance of the cross-complaint so far as it sought to impose liability on Herman, and the course of proceedings so far as it casts any light upon the matter.

The factual recitations of the complaint, preceding the claims themselves, make clear that it sought to recover damages as to Herman because she had refused his instructions to transfer his plan assets to an independent IRA, had caused almost $ 50,000 to be diverted from his account to pay counsel to defend her and the company against Meiselman in litigation, had withheld salary due to him, had improperly liquidated his investments and had charged him an improper management fee.

Apart from a count seeking declaratory relief, the counts--all naming Herman along with differing other defendants--were for breach of employment contract,

breach of fiduciary duty under ERISA, breach of the plan agreement and conversion of Meiselman's account funds. Both breach of contract claims probably could run only against the company or the plan; but breach of fiduciary duty and conversion claims were certainly potentially available against Herman in her personal capacity. *See First Union Natl Bank v. Pictet Overseas Trust Corp.*, 351 F.3d 810, 814-15 (8th Cir. 2003).

Under ERISA, a plan trustee can be held personally liable under certain circumstances for breach of fiduciary duty, 29 U.S.C. § 1109(a); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 252, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993), and a conversion of property claim would lie against the converter personally, even if the action was purportedly taken in a corporate or official capacity. *See, e.g., Tubos de Acero de Mexico, S.A. v. Am. Int'l Inv. Corp.*, 292 F.3d 471, 479 (5th Cir. 2002). [*13] Much of Herman's brief is devoted to arguing on the merits that liability under ERISA could not be imposed on Herman personally and that state law claims against her would be preempted by ERISA; but such objections were forfeited when Herman defaulted. *See Saks v. Franklin Covey Co.*, 316 F.3d 337, 349 (2d Cir. 2003). n4

A reasonable litigant, advised by competent counsel, would have had good reason to fear that personal liability might be imposed under some of the theories in the complaint. Further, the complaint made clear that Herman was being charged in some measure with personal dishonesty (for example, that Herman had charged the account for non-existent services (P 19), and that she and Caplitz were "helping themselves to Meiselman's money to defend a legal action they

instigated by their refusal to carry out their fiduciary obligations" (P 29)). [5]

Thus, when Herman failed to answer the complaint or to timely oppose the order of default or the entry of default judgment, she was taking a substantial risk as to personal liability. Nor, it appears, did she oppose the showing of Meiselman's damages by calculations made in his affidavit. So it is of little use to complain now that the damages somehow swelled from the $ 70,000 or so identified in the cross-complaint--professedly an incomplete estimate--to the much larger figure contained in the affidavits.

This brings us to the final judgment. It did refer to Herman as "trustee"--curiously the earlier notice of default did not--but it rested upon a complaint that seemingly sought in some measure to hold her personally liable. In March 2006, the execution was secured by Meiselman, making no mention of Herman's status and the attempt began to pursue Herman personally. Yet remarkably she took no action to clarify her status under the judgment until December 2006; and, because she placed herself in contempt, her present motion could not be filed until *a year* after the original execution had issued.

It would perhaps have made matters clearer if the district judge had stated that he read the cross-complaint as threatening Herman with personal liability at least as to some of the claims; but this is a determination of law and we would so construe the complaint in any event. *See* U.S. Liab. Ins. Co. v. Bourbeau, 49 F.3d 786, 787 (1st Cir. 1995). It might also have been better to amend the judgment accordingly;

but treating the "trustee" reference as surplusage is not without precedent. Gardiner v. Rogers, 267 Mass. 274, 166 N.E. 763, 764 (Mass. 1929).

One could argue that the judgment, read in light of the complaint, could include amounts for which Herman is liable personally and other amounts for which she is liable only in her corporate capacity, *i.e.*, money that should come from the company or the plan--assuming it has any other assets. Perhaps a way could be found, through a remand and further proceedings, to effect an allocation which would appear in a judgment accurately reflecting the substance of the claims on which Herman had defaulted.

But Herman has not sought such a solution either in the district court or here, even as an alternative disposition. n6 Further, any allocation would be complicated, if not made impossible, by Herman's own failure to answer the complaint and to engage in the litigation that would have sorted out her liabilities and clarified which were personal and which were not. This default, and the delays in raising the present issue, make Herman or her counsel largely the author of her misfortune.

Justice be done though the heavens fall ("*Fiat justitia, ruat coelum*") is an admirable maxim, but in practice it is hedged by requirements that litigants make reasonable efforts to answer complaints, read documents served on them, obey court orders and seek corrections in a timely manner. If what happened here is due not to Herman but her former counsel, that is a matter to be settled between them.
*Affirmed.*

Footnotes

1*See Kentucky v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) ("[A] plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself."); *First Union Natl Bank v. Pictet Overseas Trust Corp.*, 351 F.3d 810, 813-14 & n.2 (8th Cir. 2003) (noting that if claim was stated against trustee in its representative capacity, recovery would only be had from the trust assets); *Manginaro v. Welfare Fund of Local* 771, L.A.T.S.E., 21 F. Supp. 2d 284, 301 (S.D.N.Y. 1998) ("Although a trustee can be sued in his official capacity, such suits are treated as suits against the plan.").

2Herman also argues that judgment could not have entered against her personally because she was only made a party to the action, and accordingly was only served, in her capacity as trustee. This is, in substance, a claim of insufficient service of process, or relatedly, lack of personal jurisdiction over her in her personal capacity. *See generally United Elec., Radio & Mach. Workers* v. 163 Pleasant St. Corp., 960 F.2d 1080, 1085-86 (1st Cir. 1992). In fact, the return of service merely lists Herman as the recipient without referring to her capacity. In any event, Herman waived any such defense by failing to raise it even in her Rule 60(b) motion following entry of default judgment. *In re Worldwide Web Sys.*, 328 F.3d 1291, 1300-01 (11th Cir. 2003); *Swaim v. Moltan Co.*, 73 F.3d 711, 718 (7th Cir.), *cert. denied sub nom.*

3*See Powell v. Alexander*, 391 F.3d 1, 22 (1st Cir. 2004); *see also Shockley v. Jones*, 823 F.2d 1068, 1071 (7th Cir. 1987) (determining whether defendant in section 1983

action was sued in personal or official capacity by reviewing pleadings and litigation conduct); *Rice v. Hamilton Air Force Base Commissary*, 720 F.2d 1082, 1085 (9th Cir. 1983) (determining whether defendant in employment discrimination action was properly a party to the case by reviewing allegations in complaint).

4Generally, an ERISA fiduciary can only be liable to the plan and not an individual beneficiary for a breach of her duty. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985) (trustee's liability is to the plan rather than the individual beneficiary). *But see Ream v. Frey*, 107 F.3d 147, 152-53 (3d Cir. 1997) (allowing individual ERISA beneficiary to seek relief from plan fiduciary under 29 U.S.C. § 1132(a)(3) where plan was no longer functioning). The Supreme Court recently heard arguments in a case concerning the scope of relief available under 29 U.S.C. §§ 1109, 1132. *LaRue* v. *DeWolff, Boberg & Assocs., Inc.*, No. 06-856 (argued Nov. 26, 2007). Regardless of the precise scope of section 1109, any substantive defense to Meiselman's ERISA claim has been forfeited.

5Ultimately, Meiselman's damages affidavit attributed $ 824,467.58 of his $ 938,640.14 in damages (accruing interest later raised this figure) to lost capital appreciation owing to Herman's mishandling of his funds, allegedly in breach of her fiduciary duty to him.

6Nor is it clear, based on the affidavit specifying the damages, that an allocation would greatly assist Herman. The only set of damages identified in the affidavit that might readily be allocated only to a different entity are those based on Meiselman's $ 23,000

claim for breach of his employment contract and, for reasons unnecessary to develop, even this allocation might not be clear cut.

5/4/2007

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

INDIANAPOLIS LIFE INSURANCE COMPANY,
Plaintiff,

v.

ROSALIND HERMAN, TRUSTEE, FINANCIAL RESOURCES NETWORK, INC. PROFIT SHARING PLAN AND TRUST; FINANCIAL RESOURCES NETWORK, INC. PROFIT SHARING PLAN AND TRUST, GREGG D. CAPLITZ, RUDY K. MEISELMAN, M.D., HOPE E. MEISELMAN,
Defendants.

RUDY K. MEISELMAN, M.D.,
Cross-Claim Plaintiff,

v.

ROSALIND HERMAN, TRUSTEE, FINANCIAL RESOURCES NETWORK, INC. PROFIT SHARING PLAN AND TRUST; FINANCIAL RESOURCES NETWORK, INC. PROFIT SHARING PLAN AND TRUST,
Cross-Claim Defendants,

ORDER

"The Emergency Motion to Stay Enforcement of Judgment is Denied."

Judge William G. Young

Not For Publication in West's Federal Reporter
Citation Limited Pursuant to 1st Cir. Loc. R. 32.3

United States Court of Appeals
For the First Circuit

No. 06-1722

INDIANAPOLIS LIFE INSURANCE COMPANY,

Plaintiff, Appellee,

v.

ROSALIND HERMAN, TRUSTEE, FINANCIAL RESOURCES NETWORK, INC. PROFIT SHARING PLAN AND TRUST, FINANCIAL RESOURCES NETWORK, INC. PROFIT SHARING PLAN TRUST, AND GREGG D. CAPLITZ,

Defendants, Appellants,

RUDY K. MEISELMAN, M.D. AND HOPE MEISELMAN,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, U.S. District Judge]

Before

Lipez, Circuit Judge,
Stahl, Senior Circuit Judge,
and Howard, Circuit Judge.

Wayne R. Murphy with whom Murphy & Associates was on brief, for appellants.

Charles P. Kazarian, P.C. with whom Law Office of Charles P. Kazarian was on brief for appellee, Rudy K. Meiselman, M.D.

William T. Bogaert with whom Michele Carlucci and Wilson, Elser, Moskowitz, Edelman & Dicker LLP were on brief for appellee, Indianapolis Life Insurance Company.

November 9, 2006

Per Curiam. Indianapolis Life Insurance Co. brought a diversity action against Rosalind Herman, in her capacity as trustee of Financial Resources Network, Inc. Profit Sharing Plan and Trust, Financial Resources Network, Inc. Profit Sharing Plan and Trust, Gregg D. Caplitz (collectively the FRN defendants), and Rudy and Hope Meiselman seeking a declaratory judgment that it properly rescinded a "second to die" policy that it had issued on the lives of the Meiselmans. Indianapolis Life also brought a breach of contract action against Caplitz to recover a commission it paid him on the rescinded policy. The Meiselmans also brought a cross-claim against the FRN defendants stemming from a soured employment relationship between Rudy Meiselman and Financial Resources Network.

The district court granted Indianapolis Life summary judgment, ruling that, because the defendants had made an intentional misrepresentation in applying for the policy, Indianapolis Life had properly rescinded it and was entitled to a return of the commission. The court also entered a default judgment against the FRN defendants on the cross-claim, which was never answered. The FRN defendants appeal, arguing that disputed issues of material fact should have precluded the entry of summary judgment for Indianapolis Life, and that the district court should have granted their motion to set aside the default judgment.

Because we write primarily for the benefit of the parties, we omit a recitation of the background and proceed directly to the merits of the district court's rulings. We begin by considering de novo the grant of summary judgment in favor of Indianapolis Life. See Fraidowitz v. Mass. Mut. Life Ins. Co., 443 F.3d 128, 131 (1st Cir. 2006). Under Massachusetts law, an insurer may rescind an insurance policy by showing that the insured made a misrepresentation in the negotiation of the policy "with [the] actual intent to deceive" the insurer, or that the misrepresentation "increased [the insurer's] risk of loss." Mass. Gen. Laws ch. 175, § 86. Rescission is permissible if the insurer establishes either an actual intent to deceive or an increased risk of loss. See Boston Mut. Life Ins. Co. v. N.Y. Islanders Hockey Club, 165 F.3d 93, 96 (1st Cir. 1999).

It is undisputed that Indianapolis Life required the defendants to submit a statement of the Meiselmans' financial condition prepared by a certified

public accountant (CPA) as part of the underwriting process. Caplitz provided Indianapolis Life with an income verification statement for the Meiselmans purporting to be from CPA James Goodness. At Caplitz's request, the verification statement was in fact prepared by James Goodness' son, Daniel, who was not a CPA. Caplitz asked Daniel Goodness to place the verification statement on his father's stationery and to sign his father's name so that it would appear to have been prepared by a CPA. There is thus no dispute that Caplitz acted with the intent to deceive Indianapolis Life by submitting an income verification statement for the Meiselmans, which he intentionally misrepresented to have been prepared by a CPA.

The FRN defendants contend that these undisputed facts do not warrant the entry of summary judgment because Indianapolis Life has not submitted undisputed evidence that Caplitz's intentional misrepresentation increased Indianapolis Life's risk of loss. They are mistaken. Because the evidence establishes that Caplitz made this misrepresentation with the actual intent to deceive, Indianapolis Life was not required to show that the misrepresentation increased its risk of loss. See Boston Mut. Life, 165 F.3d at 99. Accordingly, Indianapolis Life was properly awarded summary judgment.

We turn now to the district court's ruling denying the FRN defendants' Fed. R. Civ. P. 60(b) motion for relief from the default judgment. We review the denial of a Rule 60(b) motion for an abuse of discretion. See Blanchard v. Cortes-Molina, 453 F.3d 40, 44 (1st Cir. 2006).

The FRN defendants' main argument is that the judgment in favor of the Meiselmans is void. See Fed. R. Civ. P. 60(b)(4). They argue that the judgment is void because the subject matter of the Meiselmans' cross-claim is identical to a prior litigation between the same parties and therefore barred as res judicata.

This argument misconstrues "a void judgment" under Rule 60(b)(4). The "concept of void judgments is narrowly construed." United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir. 1990). A judgment is void, and therefore subject to being set aside under Rule 60(b)(4), only if the court lacked jurisdiction or committed a plain usurpation of power constituting a violation of due process. See Hoult v. Hoult, 57 F.3d 1, 6 (1st Cir. 1995). "A judgment is not void simply because it is or may have been erroneous; it is void only if, from its inception, it was a legal nullity." Id.

Res judicata is an affirmative defense that is usually deemed forfeit if not raised in the answer. See Davignon v. Clemmey, 322 F.3d 1, 15 (1st Cir. 2003) (citing Fed. R. Civ. P. 8(c)). It is not a limitation on the court's jurisdiction. Cf. Scherer v. Equitable Life Assurance Society of the United States, 347 F.3d 394, 98 n.4 (2d Cir. 2003) (stating that, unlike jurisdictional defects, a court is not required to apply res judicata sua sponte). Accordingly, that res judicata may have been an available defense does not render the judgment void under Rule 60(b)(4).

The FRN defendants also argue that relief from judgment should have been granted under Rule 60(b)(1) because their failure to answer the Meiselmans' cross-claim resulted from excusable neglect. The FRN

defendants have submitted an affidavit from their attorney providing several excuses for having failed to file an answer. Counsel claims that he was confused as to whether he had filed the answer and was distracted by a family health problem. But counsel acknowledges that despite receiving several notifications from opposing counsel and the court that no answer had been filed, he still did not take responsive action. In these circumstances, the district court did not abuse its discretion in concluding that the FRN defendants had failed to establish excusable neglect. See Stonkus v. City of Brockton Sch. Dep't, 322 F.3d 97, 100-01 (1st Cir. 2003) (holding that excusable neglect was not established where counsel claimed that he was confused over the correct filing deadline and was busy with other matters).

Affirmed.

1/27/06

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

INDIANAPOLIS LIFE INSURANCE COMPANY,
Plaintiff,

v.

ROSALIND HERMAN, TRUSTEE, FINANCIAL RESOURCES NETWORK, INC. PROFIT SHARING PLAN AND TRUST; FINANCIAL RESOURCES NETWORK, INC. PROFIT SHARING PLAN AND TRUST, GREGG D. CAPLITZ, RUDY K. MEISELMAN, M.D., HOPE E. MEISELMAN,
Defendants.

RUDY K. MEISELMAN, M.D.,
Cross-Claim Plaintiff,

v.

ROSALIND HERMAN, TRUSTEE, FINANCIAL RESOURCES NETWORK, INC. PROFIT SHARING PLAN AND TRUST; FINANCIAL RESOURCES NETWORK, INC. PROFIT SHARING PLAN AND TRUST,
Cross-Claim Defendants,

JUDGMENT

This action came for hearing before the Court, Honorable William G. Young, District Judge, presiding, and the issues having been duly heard, and a decision having been duly rendered,

It is Ordered and Adjudged, and JUDGMENT shall be and hereby is entered upon the docket as follows:

1. For Plaintiff Indianapolis Life Insurance Company on its prayer for rescission of the life insurance contracts;

2. For Plaintiff Indianapolis Life Insurance Company against the Defendant Gregg D. Caplitz in the amount of Six Hundred Fifty Thousand Two Hundred and Ninety Seven Dollars and One Cent ($650,297.01), plus costs, pre judgment interest at the rate of 12% from June 15, 2004 through January 27, 2006, and post judgment interest of 4.37% from January 27, 2006 until date of collection.

3. For Plaintiff Indianapolis Life Insurance Company on the Counterclaims filed by Defendants; and

4. For Crossclaim Plaintiff Rudy Meiselman against Crossclaim Defendants Rosalind Herman, Trustee, Financial Resources Network, Inc., Profit Sharing Plan and Trust, Financial Resources Network, *Inc., and* Gregg D. Caplitz, jointly and severally, in the amount of Nine Hundred Thirty Eight Thousand Six Hundred Forty ($938,640.14) Dollars and Fourteen Cents), plus costs and pre judgment interest at the rate of 12% from February 10, 2005 through January 27, 2006, and post-judgment interest of 4.37% from January 27, 2006 until date of collection.

So entered.

3/7/2008

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

INDIANAPOLIS LIFE INSURANCE COMPANY,
Plaintiff,

v.

ROSALIND HERMAN, TRUSTEE, FINANCIAL RESOURCES NETWORK, INC. PROFIT SHARING PLAN AND TRUST; FINANCIAL RESOURCES NETWORK, INC. PROFIT SHARING PLAN AND TRUST,
Defendants, Cross-Claim Defendants, Appellants,

RUDY K. MEISELMAN, M.D.,
Defendant, Cross-Claim Plaintiff, Appellee,

GREGG D. CAPLITZ; HOPE E. MEISELMAN,
Defendants.

ORDER

by Chief Judge Michael Boudin, Senior Judge Levin H. Campbell, Judge Juan R. Torruella, Senior Judge Norman H. Stahl, Judge Sandra L. Lynch, Judge Kermit V. Lipez and Judge Jeffrey R. Howard:

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition

for rehearing en banc be denied.